1964

Metals Manufacturing Co. v. Bank of Commerce : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

METALS MANUFACTURING COMPANY, a Utah corporation,
Plaintiff and Appellant,

vs.

BANK OF COMMERCE, a Utah corporation,
Defendant and Respondent.

Case No. 10116

RESPONDENT'S BRIEF

Appeal From a Judgment of the Third Judicial District Court of Salt Lake County, Honorable Stewart M. Hansen, Judge

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STATEMENT OF THE CASE

A. This appeal presents the question of whether there is any valid reason or grounds for overturning the Trial Court's finding that the aluminum railings used to direct customer traffic and for decorative purposes in the respondent's bank are simply personal property and do not constitute a "building, structure or improvement of the land" as that term is used in Section 14-2-1 of the Utah Code Annotated.

B. The lower court sitting without a jury after having considered the evidence presented by both sides, found that such aluminum railings were not in the nature of an improvement to the structure and were, therefore, personal property not subject to the Utah Private Contracts

statute. Accordingly, the lower court entered judgment for the defendant and dismissed the plaintiff's complaint.

C. Because the facts as set forth in appellant's brief tend to be argumentive in favor of plaintiff's case, respondent sets forth the following as his statement of facts.

In the spring of 1963, respondent leased a bank building in Magna, Utah for the purpose of conducting a commercial banking business. Under the terms of the lease, the building was to be remodeled by the lessor to meet certain requirements of the lessee. The lease anticipated that all furnishings contained in the bank building would be furnished by the lessee. Prior to opening its banking business, respondent contracted with Arnold Drews of Modern Ornamental Iron Works for certain aluminum railings and gates. Drews submitted a bid for this work of $1,457.10 which was accepted by respondent (Dep. p. 7). Drews requested an advance payment on the railings representing that a lower price could be obtained if he had the cash to pay for the materials at the time they were ordered. Respondent, through its agent, C. I. Canfield, advanced $1,200.00 upon the representation of Drews (Dep. p. 5) Drews, without respondent's knowledge or consent, contracted with the appellant for the construction of these railings and agreed to pay appellant $1,748.00 for the railings. He represented to the appellant that the railings were constructed for the Idaho State Bank. Drews picked up the railings from appellant and installed them in respondent's bank. Respondent then paid him for the railings. Drews failed to pay appellant for the railings and when appellant discovered that the railings were, in fact, in respondent's bank, it made de-

mand on respondent for payment. Since respondent had already made payment for the railings, it refused to pay a second time whereupon appellant commenced action, under the Utah Private Contracts Act, Section 14-2-2 of the Utah Code Annotated, to recover the reasonable value of its materials. Respondent defended this action and the Trial Court sitting without a jury, and after having considered the evidence presented by both sides, found that such aluminum railings were personal property not subject to the Utah Private Contracts Act.

STATEMENT OF POINTS

POINT I

IN ORDER TO QUALIFY FOR RELIEF UNDER THE UTAH PRIVATE CONTRACTS STATUTE IT IS NECESSARY THAT THE PROPERTY IN QUESTION BE ANNEXED TO THE LAND OR SOME PERMANENT STRUCTURE UPON IT WITH THE INTENTION OF MAKING SUCH PROPERTY A PERMANENT PART OF THE LAND OR STRUCTURE.

POINT II

THE STATUTE IN QUESTION IS PENAL IN NATURE, IN THAT IT IMPOSES A DOUBLE LIABILITY ON THE OWNER OF PROPERTY WHO PAYS AN UNBONDED CONTRACTOR, AND THEREFORE IT SHOULD BE STRICTLY CONSTRUED.

POINT III

THE DEFENDANT, HAVING PREVAILED IN THE TRIAL COURT, IS ENTITLED TO HAVE THE APPELLATE COURT VIEW THE EVIDENCE AND EVERY FAIR INFERENCE AND INTENDMENT ARISING THEREFROM IN THE LIGHT MOST FAVORABLE TO IT. AND IF WHEN SO REGARDED, THERE IS ANY SUBSTANTIAL EVIDENCE, OR, AS SOMETIMES STATED ANY REASONABLE BASIS IN THE EVIDENCE, TO SUPPORT THE FINDING MADE BY THE TRIAL COURT, IT WILL NOT BE DISTURBED.

ARGUMENT

POINT I

IN ORDER TO QUALIFY FOR RELIEF UNDER THE UTAH PRIVATE CONTRACTS STATUTE IT IS NECESSARY THAT THE PROPERTY IN QUESTION BE ANNEXED TO THE LAND OR SOME PERMANENT STRUCTURE UPON IT WITH THE INTENTION OF MAKING SUCH PROPERTY A PERMANENT PART OF THE LAND OR STRUCTURE.

The statute provides in pertinent part as follows:

"14-2-1. Bond to protect mechanics and materialmen. The owner of any interest in land entering into a contract, involving $500 or more, for the construction, addition to, or alteration or repair of, *any building, structure or improvement upon land* shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the

contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasonable value of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon; which right of action shall accrue forty days after the completion, or abandonment, or default in the performance, of the work provided for in the contract.

"The bond herein provided for shall be exhibited to any person interested, upon request.

"14-2-2. Failure to require bond—Direct liability. Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon." Utah Code Annotated, 1953.

In a recent case involving this statute, the Supreme Court of the State of Utah stated the rule under this statute as follows:

"In order to qualify under these statutes it is necessary that there be an annexation to the land, or to some permanent structure upon it, so that the

> materials in question can properly be regarded as having become a part of the realty; or a fixture appurtenant to it; and this must have been done with the intention of making it a permanent part thereof." *King Bros. Inc. v. Utah Dry Kiln Company,* 13 U 2nd 339, 342; 374 P 2nd 254 (1962)

Considering these authorities, it seems clear that the Utah rule as to the application of the statute in question requires that in order for property to *be covered,* it must be annexed to the land or structure with *an intention of making it a permanent part of such land or structure.*

In the case of *Westinghouse Electric Supply Company v. Hawthorn,* 150 P.2d 55, 57 (1944) a case cited as authority for the rule announced by the Court in the King Bros. Case, *Supra,* after finding that the law relating to fixtures applied and that the intention with which a chattel is placed upon real estate is determinative in questions where doubt exists, the Court set forth the following tests for determining the presence or absence of intent:

> "The intent is not to be gathered from testimony of the actual state of the mind of the party making the annexation * * * but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made."

Since there was no express agreement between the vendor and vendee in the instant case as to whether the railings in question were supposed to be permanent fixtures, the four principal tests for determining intention, as set out by the court in *Westinghouse Electric, Supra,*

and quoted above, become the governing criteria, i.e. the nature of the article; the relation and situation to the freehold of the party making annexation; the manner of annexation and the purpose for which annexation was made. It is obvious from the most cursory review of the evidence in this case, that under this and any other tests, the trial Court correctly determined that the railings in question were not and were never intended to become part of the real estate.

(a) "The nature of the article." The railings involved in this case were made from aluminum bars and were designed to be and are in fact easily portable 1/ as shown by defendant's Exhibit D-5 and by the testimony of respondent's Vice President (Rec. 11, 12) the railings were constructed and attached in such a way that they can be moved from place to place on the bank premises or can be removed entirely if the volume of business makes it necessary for them to be removed. These plans for the use of the railings were communicated to the lessor of respondent's building and among respondent's officers. (R 17, 18, 19. Dep. p. 10, lines 8-10) With regard to the design of the railings, Mr. C. I. Canfield, Vice President of the respondent, stated at pages 12, 13, 16 and 17 of the Record.

> "Q. Well, just the general theory of the plan that was used for the bank. Was there any one central idea that prevailed in planning the bank?

1/ It is interesting to note that a female secretary of the Vice President of respondent removed one of the railings involved in this case in a matter of five minutes using only a screw driver. This railing was then carried to the Trial Court. (Rec. 13, 14).

"A. Well, he set up the plan of the bank, the inside of the bank, so that it can be adjusted and moved as situations require it in our operation.

"Q. Thank you. At the time you planned the bank building did you contemplate the possibility that you might to have to move to a different building?

"A. Well, we discussed it; there is always that possibility.

"Q. And if you did move to another building did you contemplate the necessity of moving the interior facilities of the bank?

"A. He set it up so that all of the equipment we have got belongs to the company, so that we can move it if we want to."

In the negotiation of the lease agreement, respondent's officers anticipated that they would want to move the railings and other furnishings from the leased premises and they specifically requested the inclusion of a provision in the lease permitting removal of these furnishings (Dep. p. 11, lines 1 thru 5 and lines 14 thru 21) (Dep. p. 16 and 17, lines 1 thru 9). Since respondents were lessees, it can be presumed that they had no intention to enrich the freehold. See *Westinghouse Electric Supply v. Hawthorn*, Supra at 58.

Testimony of a witness engaged in the production of such railings indicates that they are frequently moved from place to place by banking institutions and are treated much the same as items of furniture. (R. 31, line 1-7, 16-24)

"MR. DAHLSTROM: Have you had occasion to install these aluminum railings in any other buildings where your customers have been engaged in the banking business?

"THE WITNESS: Yes, I have.

"Q. How are they generally installed?

"A. They are generally fastened to the floor by one means or another, or the walls as the next thing.

"Q. What single bank is your principal customer for the production of these railings?

"A. I have done a great deal of work—or considerable work for the First Security Bank.

"Q. Have you ever been called upon by the First Security Bank to move any railings from one building to another.

"A. Not from one building to another, but from one location in a building to another location in the building."

Moreover, as pointed out by Mr. Canfield at the trial, there were and are plans to move the railings from place to place in the bank or to remove them entirely. In short, these railings are much the same as the desks, telephones, bookkeeping machines, the sound system or the water cooler, all of which are attached in some way to the building but can be and would be moved from place to place or removed from the building entirely if circumstances dictated.

Items such as this and heavier, more major pieces of equipment have long been held by the courts to be the type of article which constitutes personal property rather

than leinable realty. See *Ward v. Town Tavern*, 191 Or 1,288 P 2nd 216, 42 ALR 2nd 662, 667 (1951). A case holding a coffee urn, a steam chest, a soda fountain, a refrigerator and a vanity table not to be leinable because they were removable by the lessee owner at will. In the *Westinghouse Electric* case, *Supra*, the court found that electric motors, switches, "push buttons," "pulleys" and "sliding rails" were not fixtures subject to a lein because of lack of evidence showing an intent to permanently affix them to the building.

In its brief, appellant criticizes the lower court's decision complaining that the lower court did not consider evidence presented by appellant that the railing was specifically constructed to fit specific requirements as to length, width and heighth supplied by Arnold Drews (App. Br. p. 5, 8, 10 and 13). The appellant cites the case of *Knoff Woodwards Company v. Zotales*, 213 Minn. 204, 6 N.W. 2d 264, 266 (1942) as holding that the special construction of the railings and gates shows they were intended to constitute part of the building.

Appellant seems to feel that the special construction of the railings is in itself determinative of the questions of whether the railings were part of the building. Actually the cases, including the case cited by the appellant, hold that special construction is only one of many minor factors to be considered in determining whether there was an intention to annex the property in question to the land. Actually the case cited by the appellant on page 6 of his brief is distinguishable from the present case in that it involved a suit against a land owner and a statute requiring notice of non responsibility of land owners. The

property in question in that case was a wall dividing the building into two parts. Obviously, this case and the conclusions drawn from it by appellant are not applicable in the present case. And, as pointed out above, the special construction of these railings was not to permanently fix them to the building but to allow for their movement from place to place in the building or to be removed altogether. Also because of their peculiar design they could not have been used in the building for any business except the banking business. The design was for portability, not permanence. There is no rule of law holding that special construction or design in and of itself makes an item of personal property become real property. In each case it is necessary to consider the facts and circumstances surrounding the special construction or design.

On page 6 of its brief, appellant claims that the court did not consider that the desirability as part of the architectual design or finish of the building is determinative of the question of whether the railings are realty or personalty. In the first place, no evidence was introduced at trial to show that these railings were in any way part of the architectural finish of the building. In fact, they were considered to be furnishings by the persons who designed and constructed the building (Dep. 14 and 15). Secondly, even if the railings were desirable as part of the finish of the building, they would not, under the Utah rule, automatically become part of the realty.

Appellant cites certain testimony at page 7 of his brief which he contends the Trial Court should have considered as an indication that respondent intended that the railings remain attached to the premises. However, he fails

to consider that the basic thrust of respondent's testimony indicated the lack of such an intention.

Continuing on where appellant left off at (Dep. 15, line 9-11, 16, lines 20-24, 17, lines 3-9)

> "MR. MECHAM: So that any of these fixtures could be taken out?
>
> "A. Yes, or moved to any place we want to at our convenience."
>
> * * *
>
> "Q. Why did you want it in?
>
> "A. So we could remove these fixtures and equipment. Mr. Rokich rewrote the lease with these things in and it was duly executed and signed, but the effective date was not made until I give the go ahead sign as of the first of May, 1963."
>
> * * *
>
> "Q. At the time, as you have described, you had this provision put in the lease, did you anticipate having to use this provision?
>
> "A. Well, the only way I can answer that is if our business develops the way I had hoped and still hope it will that I know from past experience we would have to make changes in the bank."

In essence, what the appellant has claimed is that the Trial Court, in considering the facts, has decided against him as a factual matter, without considering the evidence, such as it was, presented by him. Appellant fails to realize that the trial court may well have considered his evidence and rejected it in favor of the weight of evidence showing a lack of any intent to permanently annex the railings in question to the real estate.

(b) "The relation and situation to the freehold of the party making annexation." The respondent occupies the premises as a lessee and, therefore, has no interest in enriching the freehold for his own benefit, as he might have if he were the owner of the freehold. (Dep. p. 15). The appellant spends a considerable part of its brief discussing the effect of the lease agreement between respondent and its lessor. Appellant claims that as a third party to this agreement, it is not legally bound by the terms of the agreement.

In the first place, respondent has made no claim that appellant is legally bound by the terms of the lease agreement. The lease is introduced merely as evidence of the intention of the party annexing the property not to permanently affix such property to the realty. The consideration of the lease for that purpose is in no way dependent on the question of whether appellant is legally bound by the terms of the lease.

Secondly, appellant cites the case of *Hammond Lumber Company v. Gardner*, 84 Cal. App, 701, 258 P. 612 (1927) as standing for the proposition that in order for intent to be binding on third persons, it must be apparent intent. The Hammond case has no resemblence whatsoever to the case before us. In *Hammond*, the court was interpreting a California statute which imposed a lein upon the owner of the real estate where he failed to post notice of non responsibility. Of course, this lien only applied to real estate. The California statute defined real estate as follows:

> "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees,

> vines or shrubs; or imbedded in it, as in the case of walls; or premanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws."

This definition in no way resembles the definition under the Utah statute and cases, since it depends on the method of attachment rather than intent to permanently affix. In the Hammond case, the court found that no notice had been given and, therefore, upheld a lower court's decision holding that the land owners property was subject to a lien. For these reasons, we feel any consideration of the *Hammond* case in conjunction with the case at bar would be erroneous.

(c) "The manner of the annexation." The railings, in question were attached to the floor by small screws approximately ¾ of inch in length. (Rec. 14 Exh. D-3). In some places the railings were screwed into wooden abutments that were attached to the wall by screws of approximately the same length. (Rec. 14). In order to stabilize the railings, holes approximately 1 inch in diameter were drilled into the floor as indicated in Exhibit D 6, 7, 8, 9 (Rec. 13, 14).

The fact that railings were designed so as to be removable without any material injury to the premises and that the supply of matching tile was retained to cover the screwholes in the floor is a further indication of a lack of intent to permanently affix the railings, and in fact indicates an intent to have the railings removed. (Rec. 19, line 23 to 30, 20, line 1 to 6):

"MR. DAHLSTROM: Would you explain to the Court what damage to the floor you might contemplate by moving these railings?

"THE WITNESS: Well, by moving the railings all that would be necessary to replace so that it would be impossible to tell there were railings there, would be to remove one piece of the vinyl tile, which we have other sections for in this event, and replace it with another section for this one, and put a plug in the hole where the bolt goes and a new piece of tile on it.

"MR. DAHLSTROM: Was this tile purchased and kept in contemplation of moving the railing around?

"THE WITNESS: Yes, or in the event we had to replace any other section."

On page 6 of its brief, appellant claims that the Court improperly considered testimony that the railings were removable without material injury to the premises as an indication that they were personal property. The appellant has cited one case, decided in 1891, involving a mortgage in which the Court found that the ability to remove without material injury to the premises was not the controlling factor. However the appellants have not considered a host of other authorities holding to the contrary. See *Braddees v. Smith,* 121 Ala, 335, 26 So. 34, 77 Am St. Rep. 61; *Smith v. Bush,* 173 Okla. 172, 44 P 2d 921 1 D 1 ALR 330; *Standard Oil Co. v. La Crasse Supra Auto Service,* 217 Wis. 237, 258 NW 791, 99 ALR 60; and 22 Am Jur, Fixtures 539, P. 748 which states:

"The majority rule is that if mortagee of land leases it to third person and gives him a right to remove from premises any chattles, he may attach,

such chattles do not become subject to the mortgage if they can be removed without injury to the realty."

It seems only logical that the ability to remove the chattles would be properly considered to be one of the facts and circumstances to be looked to in determining intent to annex the property in question to the freehold. In the present case, the railings could be removed without harm to the freehold, thus, evidencing an intent not to permanently affix them to the real estate.

The application of this rule necessarily requires a consideration of all of the facts and circumstances surrounding the annexation of any items of personality to real estate to determine the intention of the party making the annexation to permanently affix the personality to reality. In this case, after considering such facts and circumstances as it saw fit, the Trial Court decided that the bank did not affix the railings with an intention to make them part of the real estate.

(d) "The purpose for which annexation was made." The purpose for which these railings are used, to direct traffic within the bank and to decorate the bank's interior, shows a lack of an reason for their permanent attachment to the structure. (Rec. 15 line 20-24) If the building was used for a purpose other than the conduct of a banking business, these railings would not be needed to direct traffic or for decoration and would be removed.

POINT II

THE STATUTE IN QUESTION, SINCE IT IS PENAL IN NATURE, IN THAT IT IMPOSES A

DOUBLE LIABILITY ON THE OWNER OF PROPERTY WHO PAYS AN UNBONDED CONTRACTOR, SHOULD BE STRICTLY CONSTRUED.

In the case of *Backus v. Hooten,* 4 U 2d 364, 294 P 2d 703 (1956), the Supreme Court of the State of Utah, in considering the application of the statute involved here, held that because of its penal nature, in imposing double liability on unbonded property owners, the statute in question should be strictly construed. The same rule has been followed by the Supreme Court of Florida in *Greenblutt v. Boldin,* (Fla 1957) 94 So 2d 355, 59 ALR 2d, 877. A strict construction of this statute requires that in order to receiveth the benefits of the statute, a claimant has to clearly establish that the property on which he hopes to place a lien comes within the provisions of the statute. In the present case, the only evidence introduced by the appellant to meet this burden was evidenced that the railing in question had been manufactured by it according to specifications as to length and height furnished it by Mr. Arnold Drews. (Rec. p. 4) As has been pointed out above, nothing can be inferred with respect to intent to permanently affix from the fact that an item was specially fabricated as to length and height. If the statute in question was strictly construed, this evidence would be insufficient to establish entitlement to the benefits of the statute.

POINT III

THE DEFENDANT, HAVING PREVAILED IN THE TRIAL COURT, IS ENTITLED TO HAVE THE APPELLATE COURT VIEW THE EVIDENCE AND EVERY FAIR INFERENCE AND INTENDMENT

ARISING THEREFROM IN THE LIGHT MOST FAVORABLE TO IT. AND IF WHEN SO REGARDED, THERE IS ANY SUBSTANTIAL EVIDENCE, OR, AS SOMETIMES, STATED ANY REASONABLE BASIS IN THE EVIDENCE, TO SUPPORT THE FINDING MADE BY THE TRIAL COURT, IT WILL NOT BE DISTURBED.

In the case of *John C. Cutler Assn. v. D. Jay Stores*, 279 P 2d 700, 3 U 2d 107 (1955) a case where the Trial Judge was the trier of fact, the Utah Supreme Court held that "where a defendent has prevailed in the Trial Court, he is entitled to have the Appellate Court view the evidence and every fair inference and intendment arising therefrom in the light most favorable to it, and if when so regarded, there is any substantial evidence, or, as sometimes stated, any reasonable basis in the evidence, to support the finding made by the Trial Court it will not be disturbed."

Appellant devotes his entire brief to arguments that the Trial Court failed, on the facts presented, to decide in his favor. In light of the rule stated above, respondent can see no reason for the court to consider them here. Appellant had an opportunity to present evidence in support of his claim to the Trial Court. Appellant used that opportunity by presenting only evidence that the railings in question were manufactured by appellant in accordance with the specifications as to length and height provided by Arnold Drews (Rec. 3, 4, 5 and 6). Appellant cannot now complain when the Trial Court, after having fully considered the evidence presented by both sides (including any inferences favorable to appellant that may have been drawn from evidence introduced by respondent) reaches

a conclusion favorable to respondent. If this court were to change the ruling of the lower court, it would be placing itself in the position of the trier of fact.

In appellants conclusion, he erroneously states that the evidence should be considered in the light most favorable to the appellant citing *King Brother, Supra.* A cursory review of the King Brothers case indicates that the rule as to consideration of evidence in the light most favorable to the appellant only applies where a motion to dismiss the complaint is granted by the Trial Court. In this present case, no such motion was granted, and therefore, it is as clear as the sun on a cloudless day that the rule as to consideration of evidence in a light most favorable to plaintiff has absolutely no application here, and, it is even clearer than the sun on a cloudless day that after considering the evidences presented by both sides, the Trial Court was perfectly justified in deciding for respondent.

Conclusion

Based on the evidence in the record which shows that respondent had no intention to permanently annex the railings in question to the land or the structures on it, and the rule of law requiring a strict construction of the statute in question because of its penal nature and the established rule of law requiring the appellate court to rely on factual determinations of the Trial Court when supported by evidence, it can safely be concluded that the determination of the Trial Court was made in accordance with the law and facts and should not be overturned.

Respectfully submitted,
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